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CASE NO. 87-570

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NICHOLAS COLAFELLA, K. LEROY IRVIS, JAMES J. MANDERINO, MATTHEW J. RYAN, AND THE BIPARTISAN COMMITTEE FOR THE ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE FOR THE STATE OF MARYLAND, THE MARYLAND GENERAL ASSEMBLY; THE STATE OF OHIO, THE OHIO GENERAL ASSEMBLY; THE STATE OF TENNESSEE, THE TENNESSEE GENERAL ASSEMBLY

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QUESTION PRESENTED FOR REVIEW

Whether members of an investigative committee of a state legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their investigative documents and reports served during an ongoing legislative investigation?

INTEREST OF AMICI CURIAE

The legislatures of the states of Maryland, Ohio and Tennessee have been duly elected and entrusted with the power to enact laws for the public good of all the people in these states. These legislatures believe that the power to legislate is a public trust of the highest order. The power to legislate imparts the duty to protect the social relationships, economic welfare and political and personal freedoms of every individual in the state. The citizens of these states have entrusted their legislatures with the duty to enact laws to educate their children, protect the state's natural resources, regulate the fairness of commercial transactions, guarantee civil and political liberties, define and punish criminal conduct, provide for the poor, the handicapped, and the mentally disabled, promote the economic welfare, preserve the public safety, and assure the integrity and fiscal solvency of the state. The list could go on and on, for indeed no exhaustive list of state legislative duties could ever be written.

It is apparent that, if state legislatures are to fully and effectively discharge the public trust, they must have the ability to freely and independently investigate as well as debate the virtually unlimited number of issues that demand legislative attention. The people rightfully expect and depend on the existence of deliberate, enlightened and responsive state legislation. If that is to occur, state legislatures must continue to have unfettered fact-finding ability, except of course where such need is properly subordinate to constitutionally protected civil liberties. State legislatures, certainly no less than their federal counterparts, have a need to have the independence and integrity of their investigatory processes and work product protected from outside influence, harassment or disruption. The need exists, for the effect is the same, regardless of whether the interference threatened is from the executive or judicial branch or the state or federal level.

The Third Circuit's decision in this case will seriously undermine the state legislatures' continued ability to engage in meaningful fact-finding investigations. The conclusion that

members of a state legislative investigative committee, who are not themselves the targets of any federal criminal investigation, must comply with a federal grand jury subpoena for their documents and testimony during an ongoing investigation imposes significant burdens and possibly chilling effects on the legislative process.

State legislatures typically do not employ large staffs. The work of the investigative committee is most often done by the legislators themselves and one or two aides. Nor do legislative committees have the ability to devote unlimited hours and resources to a particular investigation. There will be any number of competing legislative priorities during the course of a single legislative session. The legislative branch, unlike the executive branch, is not neatly compartmentalized into divisions, bureaus and departments separately focused on discrete concerns. If the members of legislative committees are subject to the added burden of complying with, or defending against, the demands of federal prosecutors for all their records, reports and documents, or for their personal testimony about their impressions and opinions, the threat of disruption is very real. The Third Circuit purports to assuage this fear of disruption by reference to the protection from undue burden available through Rule 17 of the Federal Rules of Criminal Procedure. Petition at p. 19a. The burden of defending against an unreasonably broad or intrusive subpoena request, however, may be as threatening and disruptive as compliance in the context of the legislative fact-finding process.

The interest of the amici state legislatures in this case is not, however, driven only by concerns of administrative burdens or disruptions. An overriding concern is the possibly chilling effects of the Third Circuit's conclusion on the availability of information needed by state legislative committees. State legislative committees and federal prosecutors obviously have different goals and objectives. The former are primarily concerned with prophylactic and remedial measures. The latter focus on enforcement and punishment. The public is best served when both these interests are allowed to fully

flourish, and both interests are best achieved when they are pursued independently of the other. The independence of the federal prosecutors is rightfully protected by the courts, and the historical independence of state legislatures is entitled to the same protection.

Because state legislatures are not large bureaucratic organizations, the effectiveness of their fact-finding function is very dependent on the willingness of private citizens to voluntarily come forward and disclose information pertinent to legislative concerns. It is unquestionable that potential witnesses will be less likely to fully and candidly cooperate with state legislative committees if they know that information must be relayed, on demand, to the federal prosecutors as well. This chilling effect on voluntary cooperation would seriously undermine the state legislative fact-finding function.

This case presents a very real and practical issue of federalism. The amici state legislatures are not suggesting that the role of the federal prosecutor is less important than their own role. They are not suggesting that prophylactic legislative measures are always more important than criminal prosecutions. State legislators, like their federal counterparts, author the criminal laws and expect those laws to be aggressively enforced. These state legislatures do, however, genuinely and vigorously contend that the effectiveness of their endeavors is dependent in large measure on their ability to conduct fact-finding investigations, and that they should be allowed to conduct such investigations without the interference of federal executive officials. The remedial goals of state legislatures and the enforcement goals of the federal prosecutors should be complementary not competing. Both goals are equally important to the public order and both will best flourish if each remains independent of the other. This case presents a unique opportunity to reaffirm the principles of comity inherent in our constitutional system and clearly warrants the plenary attention of this Court.

REASONS FOR GRANTING THE WRIT
ARGUMENT

These amici state legislatures agree with and incorporate by reference herein the arguments in support of granting certiorari articulated by Petitioners in their petition at pages six through seventeen.

It simply cannot be questioned that legislative investigation is an activity well within the legitimate legislative sphere. Factual investigations are a necessary and unavoidable step in the legislative process. Indeed in most instances state legislatures are required by federal constitutional principles to predetermine that their enactments have a rational basis. In some instances they also must assure themselves that their enactments are justified by a compelling state interest that cannot be achieved by any less restrictive measure. It is apparent that if state legislatures are to meet these federal constitutional demands, they must be free to fully and expeditiously investigate the necessity for, and reasonableness of, legislative proposals. As this Court noted in *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 504 (1975), "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." It is equally true that state legislatures cannot legislate constitutionally in the absence of information respecting the reasons for, and the necessity and likely impact of, proposed legislation.

State legislatures are not large, bureaucratic organizations. The time and resources they have to devote to a particular investigation are frequently limited. State legislatures need to be able to rely on the voluntary cooperation of state executive officials and private citizens and organizations to assist them in collecting their facts and generating the ideas and proposals that will ultimately support their legislative enactments. It is simply unreasonable to expect that state legislative investigations can continue to be conducted in an effective manner if such investigations are subject to outside interference from federal executive officials, and the attendant burdens and chilling effects of such interference.

The present case presents a substantial question of federal-state relationships. The decisions of this Court would fully protect congressional investigative committees from the compulsory disclosure of their work product, impressions and opinions by federal prosecutors under the facts in this case. *Eastland v United States Servicemen's Fund,* 421 U.S. 491 (1975); *Gravel v. United States,* 408 U.S. 606 (1972). The decisions of this Court also fully support the state legislatures' legitimate expectation that their common law legislative privilege will be on a parity with the federal constitutional privilege. *Tenney v. Brandlove,* 341 U.S. 367 (1951); *Supreme Court of Virginia v. Consumers Union of the United States, Inc.,* 446 U.S. 719 (1980). The amici state legislatures respectfully urge the Court to take up this case for the purpose of reaffirming this important principle. As was so eloquently stated by the Second Circuit Court of Appeals in *Star Distributors, Ltd. v Marino,* 613 F.2d 4, 9 (2nd Cir. 1980):

> [U]nder our system of federalism, the role of the state legislature is entitled to as much judicial respect as that of Congress. . . .The need for a Congress which may act free of interference by the courts is neither more nor less than the need for unimpaired state legislatures. We show no more than "a proper respect for state functions," *Younger v. Harris,* 401 U.S. 37, 44 91 S.Ct. 746, 750, 27 L.Ed. 669 (1971), in holding that state legislators must be accorded a privilege similar to that of federal legislators.

The Third Circuit has concluded that "the Supremacy Clause sanctions 'interference' with state legislatures by the federal executive and judiciary as long as they pursue legitimate federal aims." Petition at p. 17a. That conclusion runs afoul of the principles of federalism and comity that have preserved harmony in our federal and state relationships for now over two hundred years. The idea that a federal executive official may intrude upon the legitimate activities of a state legislature whenever that official can claim a legitimate federal objective is simply unfounded in our federal system. If that idea, which is critical to the Third Circuit's reasoning in this

case, is sustained and allowed to grow, it could irrevocably strain state and federal relations. Our system of federalism is founded on the principle that the federal government will respect the ability and independence of each state to act on legitimate matters of local concern. The deliberative and investigatory activities of a state legislature are state functions of the highest order, and are entitled to be conducted free of federal interference, so long as such activities do not infringe substantive constitutional rights or negate important federal interests.

Amici appreciate the reasons why this Court held in *United States v. Gillock*, 445 U.S. 360 (1980), that the principles of comity had to yield to the important federal interests at stake in that case. But those same reasons are not present in this case. The issue in *Gillock* was "whether the federal courts in a federal criminal prosecution would recognize a legislative privilege barring the introduction of evidence of the legislative acts of a state legislator charged with taking bribes or otherwise obtaining money unlawfully through exploitation of his position." 445 U.S. at 361-362. Amici are not suggesting that legislative immunity should protect state legislators against federal prosecution based on their own misconduct. They are, however, contending that common law legislative immunity should continue to protect the independence and effectiveness of state legislative institutions, absent a claim of legislative impropriety. That issue was not addressed in *Gillock*.

The present case differs from *Gillock* in at least three significant respects. First, no member of the state legislature was a subject or target of the federal criminal investigation. Petition at p. 39a. Second, the petitioners in this case are not seeking to suppress the use of evidence in a federal criminal prosecution. The recognition of a privilege in this case will not frustrate or negate the ability of the federal prosecutors to conduct their investigations; it will only require them to conduct their investigation without the ability to compel state legislative assistance. Third, whereas the denial of the privilege in *Gillock* had only a "minimal impact on the exercise of his legislative function," 445 U.S. at 373, the denial of the privilege in this case will

have a substantial institutional impact on the state legislature. Amici believe that these differences clearly warrant the Court's plenary review of the question of whether comity must yield under the facts in this case.

CONCLUSION

For the foregoing reasons, the amici state legislatures respectfully urge that a writ of certiorari be granted in this case.

Respectfully submitted,

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